## Norazlanshah bin Hazali v Mohd Dziehan bin Mustapha

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-23CY-14–03 OF 2017
DARRYL GOON JC
21 NOVEMBER 2018

*Tort — Defamation — Alleged defamation — Defamatory statements — Identity of party referred to in publication — Whether impugned statements referred to or were 'of concerning' plaintiff — Whether actual loss proven*

This was a defamation suit brought by the plaintiff against the defendant, where the plaintiff claimed that the defendant had defamed him via three postings published in a Facebook account. The plaintiff claimed that the posting had downgraded his reputation and dignity as a lecturer, academician and scientist and that his family members felt ashamed, depressed and were looked down by all members of society. The plaintiff further testified that he was the founder of health products that were marketed and sold under the brand name 'ByDrAzlan' which was produced by 'Mataayer' a company owned by Dato' Mashita Masri ('PW2') the plaintiff's wife. PW2 claimed that the products under the brand name 'ByDrAzlan' had suffered losses allegedly due to the defamatory statements. The defendant submitted that there was no case to answer. The defendant did not deny that the statements were posted by him, however pleaded that the impugned statements did not refer to the plaintiff.

**Held,** dismissing the plaintiff's claim with costs of RM7,000:

(1) The impugned statements made no reference to the plaintiff's name, neither was there any evidence led as to how the statements may refer to the plaintiff (see paras 14–15).

(2) It was the plaintiff who associated himself with the impugned statements via a media statement issued by the plaintiff. The media statement did not assist the plaintiff to establish that the impugned statements actually referred to the plaintiff or were published of and concerning the plaintiff (see para 20).

(3) There was no loss suffered by the plaintiff, the alleged losses suffered by the sole proprietorship 'Mataayer' which belonged to PW2 and not the plaintiff who was not a party to this action, neither were the losses pleaded to be losses in sale by the plaintiff (see para 22).

**[Bahasa Malaysia summary**

Ini merupakan satu saman fitnah yang dibawa oleh plaintif terhadap defendan, yang mana plaintif menuntut bahawa defendan telah memfitnah beliau melalui tiga paparan yang disiarkan di satu akaun Facebook. Plaintif menuntut bahawa paparan tersebut telah menjatuhkan reputasi dan maruah beliau sebagai seorang pensyarah, ahli akademi dan ahli sains dan ahli keluarganya berasa malu, murung dan dipandang rendah oleh semua ahli masyarakat. Plaintif turut memberi keterangan yang dia merupakan pengasas produk kesihatan yang dijual dan dipasarkan dibawah jenama 'ByDrAzlan' yang di keluarkan oleh 'Mataayer' satu syarikat yang dimiliki oleh Dato' Mashita Masri ('PW2') isteri kepada plaintif. PW2 menyatakan bahawa produk jenama 'ByDrAzlan' telah mengalami kerugian yang kononnya disebabkan oleh penyataan fitnah tersebut. Defendan menghujahkan bahawa tiada kes untuk dijawab oleh beliau. Defendan tidak menafikan bahawa penyataan tersebut paparkan oleh beliau, namun dipli bahawa penyataan yang dipersoalkan tersebut tidak merujuk kepada plaintif.

**Diputuskan,** mengetepikan tuntutan plaintif dengan kos sebanyak RM7,000:

(1) Penyataan yang dipersoalkan tersebut tidak merujuk kepada nama plaintif, tiada keterangan yang dikemukakan menunjukan bagaimana penyataan tersebut boleh merujuk kepada plaintif (lihat perenggan 14–15).

(2) Plaintif yang mengaitkan dirinya dengan penyataan yang dicabar tersebut melalui penyataan media yang dikeluarkan oleh plaintif. Penyataan media tersebut tidak membantu plaintif untuk membuktikan bahawa penyataan yang dicabar tersebut sebenarnya merujuk kepada plaintif atau diterbitkan dan merujuk kepada plaintif (lihat perenggan 20).

(3) Tiada kerugian yang dialami oleh plaintif, kerugian yang kononnya dialami oleh tuan punya tunggal 'Mataayer' yang dimiliki oleh PW2 dan bukannya plaintif, yang bukan pihak di dalam tindakan ini, kerugian yang dipli oleh plaintif juga bukan kerugian dalam jualan (lihat perenggan 22).]

**Notes**

For cases on defamatory statements, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 450–473.

**Cases referred to**

*Ahmad Najib bin Aris v PP* [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)
*Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Nurul Izzah bt Anwar & Anor* [2018] 3 MLJ 726; [2018] 9 CLJ 285, CA (refd)

*Gnanasegaran a/l Pararajasingam v PP* [1997] 3 MLJ 1; [1997] 4 CLJ 6, CA (refd)
*KTL Sdn Bhd & Anor v Leong Oow Lai and other cases* [2014] MLJU 1405; [2014] 1 LNS 427, HC (refd)
*Mok Yii Chek v Sovo Sdn Bhd & Ors* [2015] 1 LNS 448, HC (refd)
*Pardeep Kumar a/l Om Parkash Sharma v Abdullah Sani bin Hashim* [2009] 2 MLJ 685, CA (refd)
*Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609; [2015] 2 CLJ 1037, FC (refd)
*Tiow Weng Theong v Melawangi Sdn Bhd* [2018] 6 MLJ 761; [2018] 1 LNS 869, CA (refd)

**Legislation referred to**

Evidence Act 1950 s 90A, 90A(2)

*Shahrul Azwad bin Ismail (Shahrulazwad & Co) for the plaintiff.*
*M Raja (Ram Yogan Sivam) for the defendant.*

**Darryl Goon JC:**

**[1]** This is an action in defamation brought by the plaintiff.

**[2]** The plaintiff, Dato Dr Norazlanshah bin Hazali is a visiting professor at the Faculty of Health and Life Sciences, Management & Science University in Shah Alam, Selangor. The defendant, is a government servant with the Pharmaceutical Practice & Development Division, in the Ministry of Health.

**[3]** It was the plaintiff's case that the he had been defamed by three postings published in a facebook account with the address https://www.facebook.com/mohd.dziehan. The alleged libel was pleaded in para 5 of the statement of claim in the following manner:

> 5. Defendan telah menulis kenyataan fitnah (libel) dibawah (selepas ini disebut 'Kenyataan Fitnah tersebut') pada tarikh dan masa seperti berikut:
>
> (a) Pada 28 Januari 2017 jam 6.58pm;
>
> Siapa ni ... owner dia ker? Owner dia mmg dlm siasat. Laporan lengkap kpd pihak university usim sedang dilengkapkan. Di UIA beliau telah disingkirkan. Kita tggu tindakan usim pula
>
> (b) Pada 28 Januari 2017 jam 7.37pm;
>
> UIA dh buang dia
>
> Now di usim
>
> (c) Pda 28 Januari 2017 jam 7.48 pm;

A Dia putus kan kawan dgn semua org yg tegur dia

**[4]** The plaintiff then pleaded what he asserts the aforesaid publications meant in para 6 of the statement of claim:

B 6. Di dalam maksud semula jadi dan biasa, Kenyataan Fitnah tersebut bermaksud dan difahamkan membawa maksud bahawa:

(a) Plaintif ketika itu bekerja sebagai tenaga pengajar di Universiti Sains Islam Malaysia (USIM) sedang disiasat dan sedang menunggu tindakan disiplin; Plaintif telah dibuang daripada jawatan terakhirnya oleh C Universiti Islam Antarabangsa (UIA);

(b) Plaintif bersifat tidak boleh menerima teguran daripada semua orang dan mereka yang berbuat demikian akan diputuskan persahabatan.

D THE PLAINTIFF'S CASE

**[5]** The postings of the impugned words pleaded above were admitted into evidence in the form of 'screen shots' that is to say images of the impugned words as they would appear on the screen of a computer if one were to access E the facebook account referred to above. These images were then printed out on paper, as a document. In this case, the screenshots of the impugned words pleaded were, by consent, admitted into evidence on the basis that their authenticity were not disputed save for their contents.

F **[6]** The plaintiff, who testified as PW1, testified that he was informed by his wife, Dato Mashita Masri, about the impugned postings on the 28 January 2017. Dato Mashita Masri had, in turn, been told of the posting by one Zuraini Hashim on that same day. The plaintiff testified that the postings had downgraded his reputation and dignity as a lecturer, academician and scientist. G He also testified that his family members felt ashamed, depressed and were looked down upon from rural people to academics.

**[7]** The plaintiff also testified that he was the founder of health products that are marketed and sold under the brand name of 'ByDrAzlan'. In this regard H admitted into evidence, by consent, were photographs bearing the picture of the plaintiff on billboards. The plaintiff however, could not quite remember when the billboards were put up, before or after the alleged defamation. He also testified that his image is used in the marketing of these health products. According to the plaintiff, and set out in his answer to question nine of his I witness statement (WS-PW1), at the time when the impugned publications were published he was holding the position of a lecturer at Universiti Sains Islam Malaysia. Prior to that, he was at International Islamic University Malaysia and he claimed to be known by academicians as well as members of the public through his research, written journals and articles. Also admitted

into evidence by consent were newspaper 'advertorials' and articles by the plaintiff. However, the fact that the plaintiff had healthcare products advertised and sold under the brand 'ByDrAzlan' were never pleaded in the statement of claim.

**[8]** Under cross-examination the plaintiff agreed that the three sets of statements that were impugned and pleaded in the statement of claim do not refer to him, his product or the brand name of his product. The plaintiff did insist that 'di UIA beliau telah disingkirkan' and 'kita tunggu tindakan USIM pula' referred to him. However, he later clarified that that was because the defendant knew him. There was also in evidence, a media statement by the plaintiff refuting the impugned statements. This media statement was admitted into evidence, by consent of the parties, on the basis that it is authentic and that its contents are true ie as a Part A document.

**[9]** Dato Mashita Masri, the plaintiff's wife also testified. She testified as PW2. PW2 testified that she was the owner of 'Mataayer' which is the producer of the products with the brand name 'ByDrAzlan'. She testified that the sales of the products under the brand name 'ByDrAzlan' suffered losses allegedly due to the alleged defamatory statements. PW2 testified that the total sales of the product for the period from 27 December 2016–3 January 2017 was RM102,523, which was normal. However for the period from 22 January 2017–3 February 2017, the total sales of the product was RM66,665. She also testified that on the date the defamatory statements were made ie 28 January 2017, there was no sale of the products and this was something that had never happened before. PW2 also referred to two graphs, which were admitted by consent as Part B documents said to be computer generated graphs, in support of her testimony. These graphs themselves were undated and without any particulars save for the dates and the sales figures in ringgit on the graphs. No other evidence, documentary or otherwise, was led in regard to the sales of the product.

NO CASE TO ANSWER

**[10]** At the close of the plaintiff's case, the defendant elected not to adduce any evidence and submitted no case to answer. The effect of submitting that there is no case to answer and in electing not to call evidence was recently stated by the Federal Court in *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609; [2015] 2 CLJ 1037. In delivering the judgment of the court, Azahar Mohamed FCJ stated thus:

> ... the burden of proof at all times is of course borne by the plaintiff to establish on the balance of probability the existence of a legally enforceable settlement agreement (see *Ranbaxy (Malaysia) Sdn Bhd v El Du Pont De Nemours and Company* [2011] MLJU 1135; [2011] 1 LNS 16; [2011] 1 AMCR 857). In other

words, it was upon the plaintiff itself, and certainly not the defendant, to discharge the burden of showing the settlement agreement had come into existence. It is for the plaintiff to prove its case and satisfy the court that its claim is well-founded before the court grants judgment on the claim (see *The Fordeco Nos 12 and 17; The Owners Of And All Other Persons Interested In The Ships Fordeco No 12 and Fordeco No 17 v Shanghai Hai Xing Shipping Co Ltd, The Owners Of The Ship Mv Xin Hua 10* [2000] 1 MLJ 449; [2000] 1 CLJ 605, *Maju Holdings Sdn Bhd v Fortune Wealth (H-K) Ltd And Other Appeals* [2004] 4 MLJ 105; [2004] 4 CLJ 282 and *Teh Swee Lip v Jademall Holdings Sdn Bhd* [2013] 6 MLJ 32; [2014] 8 CLJ 451). It is true that in the present case the defendant elected not to call any witnesses. However, it is imperative to bear in mind that from the outset the legal burden of the existence of the settlement agreement was with the plaintiff as the claimant in the present action. By reasons of the legal principles, the fact that the defendant led no evidence or call no witnesses did not absolve the plaintiff from discharging its burden in law. In this regard, in adopting the approach of the case of *Storey v Storey* [1961] P 63, Suriyadi JCA (as His Lordship then was) in *Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81; [2008] 2 CLJ 369 recognised this to be the case as can be seen from the following passage of His Lordship's judgment:

> There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.

**[11]** Thus the issue that the court needs to consider in this case is whether the plaintiff had discharged its burden of proving his case against the defendant such that without calling any evidence, judgment must be entered against the defendant.

**[12]** The defendant admitted that the impugned statements pleaded were posted by him. It was, however, the defendant's primary contention, which was also pleaded, that the impugned statements did not refer to the plaintiff.

**[13]** In an action in the tort of defamation, it is settled law that the plaintiff is required to prove the publication of a defamatory statement and that he was the person defamed (see *Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Nurul Izzah bt Anwar & Anor* [2018] 3 MLJ 726; [2018] 9 CLJ 285 (CA) para 27). The plaintiff must prove that the defamatory statements were published 'of the Plaintiff' or could be understood to refer to the plaintiff. In *Pardeep Kumar a/l Om Parkash Sharma v Abdullah Sani bin Hashim* [2009] 2 MLJ 685, Suriadi Halim Omar JCA explained:

> [24] To succeed in an action of slander, as in libel, a plaintiff has to prove that the matter complained of, which emanated from the defendant is defamatory, refers to

him (an issue of identification) and was transmitted to a third person (publication). The burden of establishing those ingredients at the outset rests on the plaintiff. A

DID THE IMPUGNED STATEMENTS REFER TO THE PLAINTIFF?

**[14]** The impugned statements pleaded clearly made no reference to the plaintiff's name. There is reference to an investigation and a report by University Sains Islam Malaysia being completed. There is also a statement of a dismissal by the International Islamic University of Malaysia. B

**[15]** There was however, no evidence led as to how these statements may be said to refer to the plaintiff. There was no evidence led as to whether there were in fact any lecturers investigated or dismissed at these universities at the material and other circumstances such that the statements could be said to refer to the plaintiff. How the impugned statements could be said to refer to the plaintiff was also not pleaded. C D

**[16]** There was then the issue of whether certain screenshots of statements made by others in the facebook account in question were admitted into evidence. These screenshots were intended to throw more light on who the impugned statements were meant to refer to. At the outset, and with the agreement of the parties, the court made it clear that all documents that were agreed to, and what have come to be known as Part A documents and Part B documents, were admitted into evidence. Part A documents being documents the authenticity and contents of which were admitted and Part B documents being documents the authenticity of which were admitted but not their contents. Certain documents that were in Part C, that is to say documents the authenticity and contents of which were not admitted and must therefore be the subject of formal proof, were agreed to and converted to Part B documents during the course of the trial (see *Tiow Weng Theong v Melawangi Sdn Bhd* [2018] 6 MLJ 761; [2018] 1 LNS 869 (CA)) . Foremost among these were the screenshots of the impugned statements. However, there were other screenshots in Part C that were not agreed to. Among those were the comments posted by other persons in respect of which formal proof was required by the defendant. E F G H

**[17]** What was done by counsel for the plaintiff, after admitting PW2's witness statement, was to put to PW2 the following questions:

SA: Who made all the screenshots from page 27 until 41 that will be Bundle, refer to your Bundle B1 Tab 7 pages 27 until 41, basically the whole Tab 7. Just go through one by one, my question regarding page 27–41. I

MASHITA: Ok

SA: I repeat my question who made all these screenshots all the screenshots pages 27–41?

MASHITA: I did. I sent them all these to our lawyer.

**[18]** Bundle B1 contained documents categorised into Part A, Part B and Part C documents. As mentioned, these screen shots were Part C documents. No further evidence was led in respect of these screenshots. No evidence was led as to the maker of the contents of these screenshots and none were called to testify. There was no testimony as to how the screenshots were produced although under cross-examination, PW2 agreed that these documents were computer generated. If they were to be admitted as computer generated documents under s 90A of the Evidence Act 1950, there was no attempt to meet the requirements under s 90A(2) of the Evidence Act 1950 by proving that:

(a) the documents were produced by a computer in the course of its ordinary use or;

(b) by tendering to the court a certificate signed by a person who, either before or after the production of the documents by the computer, is responsible for:

(i) the management of that computer or;

(ii) for the conduct of the activities for which that computer was used.

(See *Gnanasegaran a/l Pararajasingam v Public Prosecutor* [1997] 3 MLJ 1; [1997] 4 CLJ 6 (CA); *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800 (FC); *Mok Yii Chek v Sovo Sdn Bhd & Ors* [2015] 1 LNS 448; *KTL Sdn Bhd & Anor v Leong Oow Lai and other cases* [2014] MLJU 1405; [2014] 1 LNS 427).

**[19]** In fact these screenshots, being Part C documents, were also not sought to be marked as exhibits. The provisions under s 90A of the Evidence Act 1950 cater for advances in technology, while at the same time providing safeguards for ensuring the authenticity of computer generated documents. These provisions should not be viewed as mere technicalities. Much mischief can be achieved by computer wizardry and the safeguards in the Evidence Act 1950 go some way towards protecting against them. Parties to a litigation are entitled to demand that the law, as is prescribed in s 90A of the Evidence Act 1950, is adhered to. These screenshots were therefore neither proven nor admitted into evidence.

**[20]** In regard to the media statement that was admitted, it was a statement by the plaintiff. In this media statement, the plaintiff set out the impugned statements and sought to refute them. By doing so however, it was the plaintiff who had associated himself with the impugned statements — not the defendant. This media statement therefore does not assist the plaintiff to

establish that the impugned statements published by the defendant actually referred to the plaintiff, or were published of and concerning the plaintiff.

**[21]** Having regard to the foregoing, the court is perforce to hold that it was not proven that the impugned statements referred to or were 'of and concerning' the plaintiff.

DAMAGES

**[22]** Notwithstanding the foregoing and for completeness, I also find that no actual loss was proven to have been suffered by the plaintiff. The graph that was led in evidence by the plaintiff was for the period between 22 January 2017 and 3 February 2017. PW2, in her answer to question 9 in her witness statement, said that:

> Nevertheless, for the sales period from 22 January 2017 until 3 February 2017, the total sale of ByDrAzlan products is RM66,665.00 which is a sharp fall from the normal sales. In fact, on the date the Defamatory Statements were made on 28 January 2017, there was zero sale which had never happened before.

It was an agreed fact, and pleaded in the statement of claim, that the impugned statements, were made on the 28 January 2017 from 6.58pm onwards. Therefore if the drop in sales commenced from 22 January 2017, it could not be because of the impugned statements. In fact the graph itself clearly depicts a drop in sales commencing 27–28 January 2017. It also depicts a rise in sales from 28–31 January 2017. In addition, PW2 in her answer to question 1 in her witness statement (WS-PW2), testified that she was the owner of 'Mataayer' which is the producer of the products with the brand name 'ByDrAzlan'. In Bundle B1, admitted as a Part A document, is the search result from the Companies Commission of Malaysia on 'Mataayer'. This document states that 'Mataayer' is a sole proprietorship and the proprietor named is PW2. Thus, it would seem that the alleged loss and damage in the sale of the products marketed under the brand name 'ByDrAzlan', were in fact loss and damage suffered by the sole proprietorship 'Mataayer', which was is in fact PW2 and not the plaintiff. PW2 however, is not a party to this action. In addition, if the alleged loss in sales were losses in sale by the plaintiff, they were never pleaded as such. Thus even accepting the evidence of the plaintiffs and what was stated in the graph tended in evidence, they do not establish that there was any actual damage suffered by the plaintiff.

CONCLUSION

**[23]** Having regard to the evidence led and matters aforesaid, this court holds that the plaintiff's claim in the tort of defamation against the plaintiff is

not proven. The plaintiff's claim is therefore dismissed with costs. After hearing counsel for the parties, costs was awarded to the defendant in the sum of RM7,000.

*Plaintiff's claim is dismissed with costs of RM7,000.*

Reported by Izzat Fauzan